In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1528

MIDWEST HANGER COMPANY AND
LIBERTY ENGINEERING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 474 F. 2d 1155. The Board's decision and order (Pet. App. 22a-72a) are reported at 193 NLRB No. 85.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1973 (Pet. App. 16a-18a). The petition for a writ of certiorari was filed on May 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer discharged 17 employees because of their union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 73a-74a.

STATEMENT

A. The Board's Decision

On June 12, 1970, after having obtained signed authorization cards from a majority of the Company's employees, the Union (United Steelworkers of America) sought voluntary recognition from the Company[1] and also filed a petition with the Board for a representation election (Pet. App. 27a, 42a, 49a, 63a; A. 400-401, 448-455, 551-552, 556, 576-578, 581-583, 120, 131, 83-95, 121-128, 134, 597-598).[2] On the weekend of June 13-14, Company officials met to effectuate a planned reduction in the workforce, due to an anticipated decline in sales following a price increase (Pet. App. 26a-28a, 53a; A. 608-611, 644, 282). General Manager Ward and Plant Manager Brown selected 22 employees, primarily from the second shift, who were to be terminated, and advised them, by telephone or in person, that their discharges

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[1] Midwest Hanger Company and Liberty Engineering Corporation. These two companies have common ownership and management, and occupy the same building. They constitute a single employer for purposes of the Act (Pet. App. 1a) and are referred to herein as the "Company".

[2] "A." refers to the appendix to the briefs in the court below. A copy has been lodged with the Clerk.

were effective immediately (Pet. App. 28a; A. 713). The Board found that 18 of these employees were selected for discharge because of their union activity (Pet. App. 60a-61a).

In making this finding, the Board relied upon the circumstances, *inter alia,* that: (a) the Company's explanation that it had selected employees for discharge because of their " 'absenteeism' was but a pretext" (Pet. App. 55a); (b) the Company continued to advertise for, and hire, new employees after it had fired experienced, senior workers (Pet. App. 54a-55a, 60a); (c) while the Company normally secured a supervisor's recommendation before discharging an employee, it had discharged some of these employees over the objections of a supervisor (Pet. App. 58a-60a); (d) the Company departed from its usual practice of laying off or transferring third shift employees rather than discharging second shift employees (Pet. App. 56a); (e) the Company had previously indicated that it considered the second shift to be the source of the union activity (Pet. App. 55a); (f) the discharges immediately followed the first in-plant union activity and the coercive interrogation of employee Sells (who was subsequently discharged) regarding such activity (n. 3, *infra*) (Pet. App. 60a-61a); (g) the Company discharged the employees after informing them orally and on the crew coverage sheets that they were scheduled to work (Pet. App. 57a, 59a); (h) the Company discharged a disproportionate number of employees who had signed union authorization cards (Pet. App. 60a). The Board ordered the Company to reinstate the 18 discriminatorily discharged employees, with backpay (Pet. App. 65a-66a).[3]

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[3] The Board also found that, in February and June 1970, the Company coercively interrogated John Sells concerning his attitudes

B. The Court's Decision

The court of appeals sustained the Board's findings with respect to 17 of the 18 employees.[4] The court noted that the Company had challenged the inference of anti-union motivation to be drawn from the circumstance that all but one of the 18 had signed union cards on the ground that other discharges of non-union adherents had occurred in the same period. The court concluded that, while this "may be correct, * * * there still exists substantial evidence in the record from which the Board could infer that the discharges were discriminatory" (Pet. App. 4a). The court relied primarily upon: (a) the Company's continued advertising for new employees after discharging experienced employees (Pet. App. 5a); (b) the departure from past Company practices during slack business periods (Pet. App. 5a); and (c) the Company's failure to consult with super-

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towards unions and working in a non-union plant that might have organizational problems, and his knowledge of union activity in the plant (Pet. App. 29a-30a; A. 499, 504-506, 516); and that, on October 30, 1970, the Company threatened strikers with discharge unless they abandoned a strike which had been called (Pet. App. 28a, 64a; A. 80, 591). Concluding that these unfair labor practices, in conjunction with the unlawful discharges, "make impossible the holding of an election in an atmosphere free from fear or coercion" (Pet. App. 63a), the Board ordered the Company to bargain with the Union (Pet. App. 67a). The court below enforced the Board's remedy for these additional violations of the Act (Pet. App. 8a-11a), and the Company does not challenge that action here.

[4] The court concluded that the Board's finding that Betty Johnson's termination resulted from union activity was unsupported by substantial evidence. The court noted the undisputed evidence of her repeated absenteeism despite warnings, and the long interval between the first group of discharges and Johnson's discharge (Pet. App. 8a).

visors before selecting employees for termination (Pet. App. 7a).

ARGUMENT

The issue sought to be raised in the petition—whether a reviewing court may sustain an agency on a rationale not considered by the agency—is not presented here. As shown (p. 3, *supra*), the Board based its finding that the discharges were discriminatory on a number of circumstances, one of which was that a high proportion of the dischargees had signed union cards. The Company challenged reliance on the latter circumstance on the ground that there had been other discharges of non-union employees. The court below found it unnecessary to pass on the validity of the Company's belated contention as to that particular circumstance,[5] since the other factors relied on by the Board were adequate to support its finding of discrimination.[6] Accordingly, the only issue actually presented is whether the court correctly concluded that, even apart from that factor, there is substantial evidence to support the Board's finding. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. In any event, the facts summarized above show that there is ample basis for the Board's finding.

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[5] The Company first raised the contention at oral argument before the court and in a post-argument supplemental statement.

[6] The court did not inject a new element into the proceeding by noting (Pet. App. 5a) that the Company, while complaining about employee turnover and the resulting inexperience of its workforce, preferred to recruit new, untrained personnel instead of recalling the experienced dischargees (see Pet. App. 54a, 60a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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